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EQUAL
JUSTICE
CENTER

#12

Late Backup

October 5, 2012

Cindy Crosby
City of Austin Law Department
301 W. 2nd Street
Austin, Texas 78701

**Re: Prevailing Wage Complaints by Employees of Phoenix Mechanical Corp. on
Dittmar Gym and Northwest Recreation Center**

Dear Ms. Crosby,

Since this matter has been referred to the City Council for action, I would like to summarize the workers' position and our discussions with the City's Contract Management Department (CMD) staff regarding their investigation. We fundamentally disagree with CMD's recommendations as set forth below.

I. Introduction

The Equal Justice Center is a nonprofit law firm that represents low-income workers in employment matters. We represent eight workers who filed complaints that they were not paid the required prevailing wage for their work on the City of Austin's Northwest Recreation Center and Dittmar Gym projects. The workers were employees of subcontractor Phoenix Mechanical Corporation, which installed the heating, ventilation, and air conditioning (HVAC) systems on these projects.

The Contract Management Department (CMD) conducted an investigation and is recommending that the City find no good cause as to almost all of my clients' claims. This letter is to explain my clients' positions that: 1) the CMD staff is applying an eminently incorrect standard of proof that almost always will result in findings of no good cause; and 2) there is overwhelming evidence in these cases that violations occurred.

II. Misclassification

Contractors rarely are so bold or thoughtless as to produce payroll reports that show prevailing wage violations on their face.¹ Rather, violations typically occur when a contractor misclassifies workers under a lower paid job classification and pays at least that lower rate. Consequently, the central question in prevailing wage investigations almost always is whether the workers were properly classified based on the type of work they performed.

¹ For a helpful summary of Texas prevailing wage Statute at issue (Texas Government Code Chapter 2258), see the September 27, 2012 Memorandum from Rosie Truelove, Director of the City's Contract Management Department (CMD) regarding this matter.

The workers in these cases contend that they worked as Sheet Metal Workers for most or all of their time on the projects. However, Phoenix Mechanical's certified payroll reports classify almost all of its employees for the overwhelming majority of their hours as HVAC Mechanics—a lower paid classification than Sheet Metal Workers.

One of the ambiguities in the statute and the City of Austin's wage scale stems from the lack of any precise, authoritative definitions of the various job classifications. However, CMD staff have provided their understanding of the relevant job classifications as follows: a worker must be classified as a Sheet Metal Worker for all hours in which he is working directly with sheet metal, including HVAC duct, but may be classified as the lower paid HVAC Mechanic for hours in which he is not working directly with sheet metal.

It is undisputed that the only tasks performed by the workers in these cases were preparation and installation of sheet metal air ducts and installation of the air handling units. The ductwork is by far the more time-consuming of these two tasks. CMD staff confirm that, at the very least, a substantial portion of the HVAC work on any given construction project must be under the Sheet Metal Worker classification.

III. CMD's First Investigation

Before the current claims, while the project was still ongoing, CMD received prior complaints of prevailing wage violations from other workers on the Northwest Recreation Center project. CMD conducted an investigation and found that several of the subcontractors on the project, including Phoenix Mechanical, were not paying the proper prevailing wages.

CMD staff member Russell Kyle visited the work site and observed several of Phoenix Mechanical's employees performing sheet metal work while they were being paid at the lower HVAC Mechanic wage. Since Phoenix Mechanical kept no records of how many hours, if any, its employees were truly performing only HVAC Mechanic work, CMD required Phoenix to pay back pay to all of its employees on the project for all of their hours at the Sheet Metal Worker wage rate.

IV. CMD's Investigation in the Present Case

After CMD's first investigation, Phoenix Mechanical blatantly continued paying its Sheet Metal Workers at the lower HVAC Mechanic rate for almost all of their hours. CMD's first investigation covered only a fraction of the man-hours that Phoenix Mechanical's employees ultimately worked on the project. Only one of the workers in the present case, Pedro Mancera, had worked any hours that were covered by CMD's first investigation.

CMD obtained the certified payroll reports generated by Phoenix Mechanical. For the overwhelming majority of the hours, they classify the workers as the lower paid HVAC Mechanic position, which CMD already found was improper. For example, the reports show only 8% of the man-hours on the Northwest Recreation Center project were paid at the Sheet Metal Worker rate, including the period of time during which CMD was trying to enforce the law. Indeed, most weeks reflected zero hours of sheet metal work even though ducts were being installed. Also, in a few instances the payroll reports show violations on their face—that is, they

show some workers classified for a few hours as Sheet Metal Workers but still paid less than the prevailing wage.

The workers provided the following additional evidence to CMD staff in support of their claims:

1. A signed, sworn statement from each worker detailing the job duties he performed on these projects and explaining how Phoenix Mechanical routinely falsified their payroll;
2. Numerous pay stubs that each worker had in his possession which corroborate their estimates of unpaid wages and which in many instances contradict the hours and wage rates stated in Phoenix Mechanical's certified payroll reports; and
3. Spreadsheets detailing the calculations of each worker's unpaid wages on each project.

Phoenix Mechanical has since dissolved its business, and its principals cannot be found. The contractors have no evidence or other basis to dispute the workers' claims. Therefore, the workers' claims are undisputed.

Nevertheless, CMD has recommended that the City Council find that there is no good cause that any violations occurred in these cases, except for those few hours in which the violations are unquestionably proven on the face of the payroll reports.

V. Standard of Proof

On August 1, 2012, EJC met with CMD staff members Russell Kyle and Frank Mays to discuss the results of their investigation. Mr. Kyle and Mr. Mays articulated the standard of proof they were applying at different moments during our conversation as "clear and concrete," "completely convincing," and "beyond any reasonable doubt." They concluded the workers could not meet this high burden. This standard is incorrect and almost always will result in findings of no good cause.

This concept is so fundamental that the most general of legal reference sources provides sufficient instruction:

The function of a standard of proof . . . is to instruct the fact-finder concerning the degree of confidence society thinks he or she should have in the correctness of factual conclusions for a particular type of adjudication. In civil cases, no doctrine is more firmly established than that issues of fact are resolved from a preponderance of the evidence. . . . Accordingly, in civil cases, a party is not required to establish facts in issue beyond a reasonable doubt, as is required in a criminal prosecution. . . . [Clear and convincing evidence] is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings . . . The court applies the clear and convincing evidence standard to civil matters only in extraordinary circumstances . . . [and] only in circumstances where clear statutory language permits its application.

35 *Tex. Jur. Evidence* §§ 109-113.

Prevailing wage claims are civil matters adjudicated in arbitration. Therefore, in order for a claimant ultimately to prevail, the arbitrator must find by a preponderance of the evidence that a violation occurred. The public body (the City of Austin here) has no authority to make that ultimate decision. Rather, the statute only authorizes the City to “make an *initial determination* as to whether *good cause* exists.” Tex. Gov. Code §§2258.052 (italics added). “Good cause” in this context is synonymous with the “probable cause” used in criminal law.

Probable cause for arrest deals with probabilities; there must be more than mere speculation but far less than needed to convict or even to find a preponderance of the evidence. . . . The direct personal observations of an affiant for the issuance of a warrant of arrest may be sufficient to constitute probable cause for the issuance of the warrant.

22 *Tex. Jur. Criminal Procedure: Pretrial Proceedings* § 297.

In both the criminal law context and the prevailing wage statute, the purpose of the initial investigation is to determine whether some minimal amount of evidence exists to take some action pending the ultimate adjudication. The City’s investigation and initial determination serve a simple gate-keeping function before the matter proceeds to arbitration. It would be a preposterous perversion of the statute for the City to compel workers to present and prove their entire case at this preliminary stage without the benefit of such basic due process as discovery and cross-examination of opposing parties.

VI. CMD’s Analysis of the Evidence

In our August 1 meeting with CMD staff, Frank Mays and Russell Kyle explained their analysis of the evidence in these cases, based on their understanding of the standard of proof, as follows.

A. *Workers’ Sworn Statements*

CMD utterly disregarded the workers’ *undisputed* testimony because, as CMD staff explained, “anybody can say anything.” However, even under the higher standard of preponderance of the evidence, a court or arbitrator must accept a party’s testimony as true when no other witness can dispute it.

B. *Previous Violations and Payroll Reports*

Even though in its first investigation CMD required Phoenix Mechanical to pay all of its workers at the Sheet Metal Worker rate, it disregarded the fact that the payroll reports for the remainder of the project classified all the workers as HVAC Mechanics for almost all their hours. CMD staff responded that it is theoretically possible that nearly all the duct work was performed before CMD’s investigation, which occurred very early in the project, and no duct work was performed thereafter. Such a strained hypothesis ignores the reality of how HVAC systems are installed. But more importantly, it demonstrates the nonsensically high standard of proof CMD is using.

C. *Pay Stubs*

The pay stubs that the workers had in their possession in many instances contradict Phoenix Mechanical's certified payroll reports, corroborating the workers' testimony that Phoenix routinely falsified its payroll. Furthermore, the pay stubs show many hours of work on these projects that are not reported at all on the payroll reports. Apparently, CMD disregarded this evidence as well.

VII. Timing of Complaints

CMD should be commended for its efforts to enforce the prevailing wage law at the beginning of its construction projects and while the projects are ongoing. However, CMD clearly is taking a starkly different approach when complaints are made after a project is concluded.

Frank Mays and Russell Kyle explained that, notwithstanding all the evidence supporting the workers' claims, they could not be "completely convinced" that violations occurred because they did not personally observe the workers performing Sheet Metal Worker tasks. This standard of proof is not authorized by the statute and is designed to result in a finding of no good cause in almost all cases brought after the completion of a project.

Indeed Mays explicitly cited the fact that these complaints were filed after the conclusion of the construction project as one of the reasons for CMD's recommendation of no good cause. Mays elaborated on this point in his August 6, 2012 letter (enclosed) announcing CMD's recommendation:

The importance of timely notice and knowledge in the enforcement of the wage rate statute cannot be overemphasized. The City has the ability to withhold funds from the contractor to force the resolution of claims; however, when the City no longer holds any project funds, its ability to enforce the statute is extremely limited.

It is perplexing why CMD would so zealously enforce the statute while construction projects are ongoing, yet harbor such a transparent hostility toward complaints made after a project is completed. CMD's approach benefits the prime contractors who work with the city because, if funds are withheld during a project, the prime contractor can avoid any repercussion by simply withholding the same funds from payments to its subcontractors.

VIII. Conclusion

Enforcement of the prevailing wage statute is so rare throughout Texas that it is the norm for contractors to disregard its requirements. While the workers in the present cases were fortunate to find legal representation, thousands more in Austin and across Texas are cheated out of their wages every day. That is why robust enforcement, following the statutory standard, is crucial to upholding the floor of fair wages the prevailing wage law seeks to maintain.

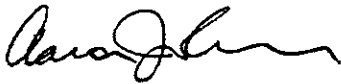
The City of Austin clearly is committed to upholding the prevailing wage law, having dedicated multiple staff members and public resources to enforcing it. However, the present cases

demonstrate an obstacle within the administration to carrying out the City's mandate. Under its current approach, CMD will reject all valid claims brought after a project is complete, as long as it finds any theory, no matter how unlikely, to explain away the evidence of wage violations. It may be that CMD's staff simply is misinformed about the proper standard of proof. But it is troubling that the City's administration may be perceived as being co-opted by the contractors it is charged with regulating.

We urge the City's attorneys, administration, and the City Council to take the measures within its power to eliminate CMD's apparent hostility to certain prevailing wage complaints, including: rejecting CMD's recommendations in the present cases; recommending that the City Council find that there is good cause to believe violations existed; and retraining CMD staff on the appropriate standard of proof in prevailing wage investigations.

Thank you for your attention to this matter, and please let me know if we can provide any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'Aaron Johnson', with a stylized, flowing script.

Aaron Johnson
Staff Attorney
(512) 474-0007, ext. 104



City of Austin

Contract Management Department 505 Barton Springs Rd. Austin, TX 78704 512-974-7051

Aaron Johnson
Equal Justice Center
510 S. Congress Ave., Ste. 206
Austin, TX 78704

August 6, 2012

Dear Mr. Johnson:

Thank you for meeting with the City of Austin's Wage Compliance Team, to discuss the wage rate claims described below. In reviewing the submitted claims, the Wage Compliance Team has come to the following conclusions:

1. Northwest Recreation Center Project

After a thorough review of the claims at the Northwest Recreation Center Project, the City cannot find sufficient evidence to substantiate the validity of the claims and establish good cause that a violation occurred. Workers' statements of unpaid hours and/or misclassification as to the work performed are not supported by the evidence available.

In addition, this project is complete, final payment has been made to the contractor, and there are no remaining contract funds in the City's possession. Therefore, the City cannot withhold the amount of unpaid wages and the conditional penalty from payment to the contractor in order to enforce a wage rate claim. Please note that this does not mean that your clients do not have a valid claim; it means that the City cannot make a preliminary determination on the basis of the information submitted and it has no present enforcement mechanism to address this situation.

2. Dittmar Gym Enclosure Project

After a thorough review of the claims at the Dittmar Gym Enclosure Project, the City can find evidence to support the claims of two workers: Adelaido Cruz in the amount of \$205.12 and Teodoro G. Cruz in the amount of \$1.94. A Voluntary Correction Action Plan has been sent to the prime contractor and the prime contractor has agreed to pay the back wages assessed. Again, this project is complete, final payment has been made to the contractor, and there are no remaining contract funds in the City's possession. Therefore, the City cannot withhold the amount of unpaid wages and the conditional penalty from payment to the contractor in order to enforce a wage rate claim. Please note that with respect to the other worker claims that cannot be

substantiated by the City on the basis of certified payrolls obtained from the contractor, this does not mean that your clients do not have a valid claim; it means that the City cannot make a preliminary determination on the basis of the information submitted and it has no present enforcement mechanism to address this situation.

The City of Austin will consider the wage claims on the Dittmar Project to be closed when we receive proof of payment by the prime contractor to the workers in the form of cancelled checks or notarized statements in the full amount of the wages due.

The importance of timely notice and knowledge in the enforcement of the wage rate statute cannot be overemphasized. The City has the ability to withhold funds from the contractor to force the resolution of claims; however, when the City no longer holds any project funds, its ability to enforce the statute is extremely limited. The City recognizes the importance of the wage rate program and zealously investigates and enforces the law when it receives notice of alleged violations. The City has an excellent record of enforcement when it receives timely notice and is able to investigate current payroll activity, worker roles, and contractor documentation. Any alleged violations of the statute and the City's Ordinance will be investigated promptly and diligently with a goal of equal justice for the affected workers.

Respectfully,

A handwritten signature in black ink, reading "Frank Mays", with a stylized flourish at the end.

Frank Mays
Division Manager
Contract Administration Division

cc: Rosie Truelove, Director, Contract Management Department
Rolando Fernandez, Assistant Director, Contract Management Department
Cindy Crosby, Assistant City Attorney
Gordon Bowman, Assistant City Attorney